MALAYSIAN EUROPEAN PRODUCTION SYSTEM SDN BHD

v.

ZURICH INSURANCE (MALAYSIA) BHD

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL APPEAL NO: 12-376-02]
6 JANUARY 2003

ARBITRATION: *Stay of proceedings - Application - Extension of time - Whether constituted a step in the proceedings within s. 6 Arbitration Act 1952 - Rules of the High Court 1980, O. 3 r. 5(3) - Jurisdiction - Whether application for stay properly taken in Sessions Court - Whether there was a dispute to be referred to arbitrator*

ARBITRATION: *Stay of proceedings - Principles - Agreement to refer to arbitration "all differences arising out of policy" - Dispute whether death of insured a suicide or accidental - Whether there exists a clear difference of opinion between parties - Whether to be referred to arbitrator*

CIVIL PROCEDURE: *Stay of proceedings - Appeal against grant of stay by Sessions Court - Arbitration agreement - Arbitration Act 1952, s. 6 - Exercise of discretion to grant or refuse stay pending arbitration - Principles - Whether stay ought to be granted*

WORDS & PHRASES: *"any party to the legal proceedings may apply to the court" - Arbitration Act 1952, s. 6 - Whether "court" only referred to High Court*

The plaintiff had bought a group personal accident policy from the defendant and during the period of cover, one of plaintiff's employees ('the insured') died of "Pulmonary Aedema To Acute Drowning." The defendant repudiated liability to the plaintiff and subsequently the plaintiff filed a suit against the defendant. Meanwhile, the defendant filed an application to stay all proceedings and to refer the matter to arbitration as stated in the policy of insurance. The sessions court judge granted an order in terms of the defendant's application. Dissatisfied, the plaintiff appealed and raised these issues: (1) that the defendant, by obtaining an extension of time to file the defence, had taken a step in the proceedings; (2) that the sessions court had no jurisdiction to give an order to refer the matter to arbitration and; (3) there was no dispute.

Held:

[1] Pursuant to O. 3 r. 5(3) of the Rules of the High Court 1980 ("the rules") the defendant can apply for extension of time without the need to apply to court. The plaintiff had given a written consent to the defendant's request for extension and cannot now seek to argue that the granting of the consent must be held against the defendant. The defendant had not, by merely writing the letter dated 16 September 2002, taken any step in the proceedings within the meaning of s. 6 of the Arbitration Act 1952. (pp 367 h & 368 g)

[2] Section 6 of the Arbitration Act 1952 provides "any party to the legal proceedings may apply to the court" means the court in which the proceedings had been commenced. That is why whilst all other sections in the Arbitration Act make reference to the High Court, it is only s. 6 that does not refer to the High Court. It merely says "apply to the court". Since the words "High Court" have been specifically left out, then it was not for this court to read otherwise into the Arbitration Act. Thus the application for stay has been properly taken in the sessions court. (p 369 e-g)

[3] The plaintiff claimed that the death was accidental, thus covered by the policy but the defendant said the death was caused by suicide. There was a clear instance of a difference between the parties and hence, there was a dispute that should be referred to an arbitrator. There is little a defendant is obliged to do in the arbitration beyond asserting a willingness to appoint an arbitrator. Here, the evidence clearly supported the inference that the defendant was ready and willing to do all things necessary to refer the matter to arbitration. It was imperative that the court must agree with the views expressed by the parties in the policy that they would rather arbitrate than litigate. (p 370 e-g)

[Appeal dismissed with costs.]

Case(s) referred to:

Accounting Publications Sdn Bhd v. Ho Soo Furniture Sdn Bhd [1999] 1 CLJ 756 CA ***(refd)***

Brighton Marine Palace and Pier, Ltd v. Woodhouse [1893] Ch Div 486 ***(refd)***

Ford's Hotel Co v. Bartlett [1896] AC 1 ***(refd)***

Interscope Versicherung Sdn Bhd v. Sime Axa Assurance Bhd & Anor Appeal [1999] 2 CLJ 843 CA ***(refd)***

Sanwell Corp v. Trans Resources Corp Sdn Bhd & Anor [2002] 3 CLJ 213 FC ***(refd)***

Trans Resources Corp Sdn Bhd v. Sanwell Corp & Anor (No 2) [1999] 3 CLJ 215 HC ***(refd)***

Usahabina v. Anuar Yahya [1998] 2 CLJ Supp 131 HC ***(not foll)***

Legislation referred to:
Arbitration Act 1952, s. 6
Rules of the High Court 1980, O. 3 r. 5, O. 12 rr. 6, 7, O. 69

For the plaintiff/appellant - Simon Tan; M/s Lee Hean Cheng & Co
For the defendant/respondent - P Ramanathan; M/s VP Nathan & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

RK Nathan J:

The plaintiff bought a group personal accident policy from the defendant and paid a premium of RM1,989.13. The policy covered the insured namely the insured person named or referred to in the specification of insured persons (insured). The policy *inter alia* was designed to cover the insured's death during the period of cover and if death or permanent disablement occurred, then in either case, the insured's estate or the insured was entitled to a sum of RM120,000. However one of the exceptions to the payment was if the death or disablement resulted directly or indirectly from suicide or attempted suicide. On 26 March 2000 which was during the period of cover, one of the plaintiff's employees (the insured) Barbara a/p Anthony Dass died and the death certificate issued by the government hospital showed the cause of death as "Pulmonary Aedema To Acute Drowning". On 28 March 2000 the plaintiff informed the defendant of this fact by a fax message.

Unfortunately no other correspondence has been enclosed in the Appeal Record to show when the defendant actually repudiated liability to the plaintiff. There must have been a repudiation because the plaintiff filed this suit against the defendant on 22 May 2002 and the first return date of the summons was on 17 July 2002. On 11 June 2002 the plaintiff served by registered post the said summons on the defendant.

The next relevant letter exhibited by the parties is a letter from the defendant's solicitors to the plaintiff and purportedly dated 16 February 2002. I cannot understand why the defendant's solicitors dated the letter even before the summons was filed, and yet stated the correct summons number on the said letter. As the facts would unfold, the contents of this letter are very important to both parties. This letter is reproduced for its contents.

VP NATHAN & PARTNERS
PEGUAMBELA DAN PEGUAMCARA

your reference: L/274/2001/LHC/ST

WHEN REPLYING PLEASE
QUOTE OUR REFERENCE: VPN/PRM/RN/SM/B 15202P 16/2/2002

M/s Lee Hean Cheng & Co.
Advocates & Solicitors,
No. 41-5-3, 5th Floor, ATTENTION; MR. SIMON TAN
Wisma Prudential, FAX/POST
Jalan Cantonment,
10250 Penang.

Dear sirs,

Re: Penang Sessions Court 92 Civil Action No: 52-1131-2002

We refer to the telephone conversation between our Mr PR Manecksha and your Mr Simon Tan this afternoon.

We shall be obliged if you will serve on us a copy of the summons and statement of claim as we have instruction to enter appearance and file a defence.

We confirm that you will get as a mention on behalf on 2/8/2002 and give us at least one month to enable us to file the defence.

We thank you for your indulgence.

In the meantime please note that the reference for this file is B39202P and shall be obliged if you will use same in all future correspondence.

Kindly update your records.

Yours faithfully,

Sgd.

Whilst this wrongly dated letter requests the plaintiff's solicitors to serve the summons on them, the plaintiff s solicitor's clerk had in the meantime filed an affidavit of service on 19 June 2002 confirming that he had served the summons on the defendant by AR registered post.

In the meantime on 4 September 2002 the defendant filed an application to stay all proceedings and to refer the matter to arbitration as stated in the policy of insurance. The learned sessions court judge granted an order in terms of the defendant's application. Dissatisfied with that decision the plaintiff has appealed.

Findings Of The Court

The plaintiff raised three issues on appeal before me.

(1) That the defendant had taken a step in the proceedings

It was the plaintiff s contention that having written the letter dated 16 February 2002 and in which the defendant had sought and obtained an extension of "at

least one month to enable us to file the defence", the defendant had taken a step in the proceedings. The plaintiff relied heavily upon the recent decision of the Federal Court in *Sanwell Corp v. Trans Resources Corp Sdn Bhd & Anor* [2002] 3 CLJ 213. I heard *Sanwell*'s case at first instance (see *Trans Resources Corp Sdn Bhd v. Sanwell Corp & Anor (No 2)* [1999] 3 CLJ 215. I held that the entry of a conditional appearance pursuant to O. 12 r. 6 and 7 of the Rules of the High Court 1980 (the RHC) is only available to cases where the defendant complained of an irregularity or defect in the originating process or service of the process upon him and/or where the defendant alleges that the court is without jurisdiction to deal with the dispute. I further held that the entering of an unconditional appearance could not amount to a waiver of the defendant's right to proceed to arbitration on the basis that the plaintiff's filing of the civil suit did not amount to either an irregularity or a defect in the writ or service thereof and in opposing the action it had not been the first defendant's contention that the court has no jurisdiction to deal with the dispute. It must be noted that in *Sanwell*'s case the defendant did not ask for nor apply to court for an extension of time to file the defence. In deciding as I did I did not follow the decision of another High Court in *Usahabina v. Anuar Yahya* [1998] 2 CLJ Supp 131. In *Usahabina* the contractor who agreed to build a house sued the house owner to recover his cost. The defendant owner having entered a conditional appearance because of the existence of an arbitration clause failed to file his defence within the stipulated period. However the plaintiff contractor allowed by letter, the defendant's request for an extension of one week to file the defence. Since the defendant had failed to file the defence within the extended period, the plaintiff entered judgment in default of defence. Soon thereafter, the defendant applied by summons to set aside the judgment in default and to stay all proceedings pending reference to arbitration. On these facts the High Court held that the defendant's request for extension of time to file his defence did not amount to the taking of any steps in the proceedings. However the court went on to hold that the filing of an unconditional appearance meant that the defendant had elected to allow the action to go on and had accordingly submitted to the jurisdiction of the court and that this amounted to a step in the proceedings thereby precluding the defendant from obtaining an order staying the proceedings.

In *Interscope Versicherung Sdn Bhd v. Sime Axa Assurance Bhd & Anor Appeal* [1999] 2 CLJ 843, the Court of Appeal upheld the decision in *Usahabina*. I must admit that when I decided *Sanwell* I did not have the benefit of the decision of the Court of Appeal in *Interscope*. However when *Sanwell* went up to the Court of Appeal, the Court of Appeal relied on its own decision in *Interscope* and reversed *Sanwell*. The Federal Court in hearing *Sanwell*, very meticulously went through each of these cases and decided that the entry of appearance was a mandatory procedural step to be taken by an applicant in

proceedings in the High Court. It was a step in the proceedings as required by the RHC. However it was a permitted, excluded or an exempted step in the proceedings that did not amount to a step in the proceedings within the meaning of s. 6 of the Arbitration Act 1952 which would prejudice the applicant's right to apply for a stay of the proceedings. The Federal Court went on to hold that if the applicant had served any pleadings, then he had clearly taken a step in the proceedings within the meaning of s. 6 of the Arbitration Act 1952, since he has elected to proceed with the proceedings in the High Court and would therefore be barred from applying for a stay of proceedings to refer the dispute to arbitration. However the Federal Court went on to hold that if the applicant had taken any other action in the proceedings other than steps of entering appearance or serving pleadings, the court would then have to consider whether such action amounted to a step in the proceedings by determining the nature of the action and whether or not it indicated an unequivocal intention to proceed with the suit and to abandon the right to have the dispute disposed off by arbitration.

Relying on the decision of the Federal Court, the plaintiff argued that by applying and obtaining an extension of time to file the defence, the defendant had indicated an unequivocal intention to proceed with the suit and had therefore abandoned the right to have the dispute disposed off by arbitration. Having considered carefully the arguments of the plaintiff, I do not agree with this view. As very succinctly explained by Mohtar Abdullah FCJ in *Sanwell*, the defendant only applied to stay proceedings after it had failed to file the defence within the extended period of time given to it and after the plaintiff had obtained judgment. By then it was too late.

From reading the judgment of the Federal Court in *Sanwell*, it becomes clear that the defendant had two choices upon receipt of extension of time. He could have filed the defence or he could have within the extended time applied for a stay without taking any other step.

In *Brighton Marine Palace and Pier, Ltd v. Woodhouse* [1893] Ch Div 486, North J held that asking for time by letter is not taking a step in the action; it is taking a step outside the action altogether. I agree with this proposition of the law. The defendant can apply for extension of time pursuant to O. 3 r. 5 of the RHC. It is pertinent to reproduce O. 3 r. 5 which reads as follows:

> 5. Extension, etc of time
>
> (1) The Court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by these rules or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

(3) The period within which a person is required by these rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose.

(4) ...

Since sub-r. (3) provides for written consent by a letter without the need for an order of court, I hold that having given the written consent, the plaintiff cannot now seek to argue that the granting of the consent must be held against the defendant. Of course the application by letter dated 16 February 2002 was made under sub-r. (3) which provides for enlargement of time without taking any step in the proceedings. It is clear that the very object of sub-r. (3) is to enable the parties to enlarge time by consent without the need to apply to court and thus taking a step in the proceedings. However if the plaintiff had refused the application for extension of time then the defendant would have been compelled to apply to court and this would be tantamount to taking a step in the proceedings. This view becomes all the more clear with the Federal Court's reference to the case of *Ford's Hotel Co v. Bartlett* [1896] AC 1. In *Ford's Hotel Co*., the House of Lords held that when a defendant took out a summons or obtained an order for further time to deliver his defence, he is deemed to have taken a step in the proceedings within the meaning of the Arbitration Act 1952 and was not afterwards entitled to apply for a stay on the ground that the proceedings were brought in respect of a matter agreed to be referred to arbitration.

In the circumstances, it is my judgment that since the plaintiff had consented to the defendant's request for extension of time and since the application for a stay of proceedings was indeed filed before the next return date and since the plaintiff who had indeed served the summons as early as on 11 June 2002 on the defendant personally, had failed to take judgment on 17 July 2002 or the next return date, the defendant had not, by merely writing the letter dated 16 February 2002, taken any step in the proceedings within the meaning of s. 6 of the Arbitration Act 1952.

(2) Sessions court has no power to grant a stay

To fully appreciate this argument of the plaintiff, it is necessary to reproduce s. 6 of the Arbitration Act 1952 which reads as follows:

6. Power to stay proceedings where there is submission to arbitration

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration, or any person claiming through or under him, in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The plaintiff's case is that the sessions court does not have the jurisdiction to give an order to refer the matter to arbitration. This is because the 'High Court' as defined in the Arbitration Act 1952 means the High Court in Malaya or the High Court in Sabah or Sarawak as the case may require. Further the plaintiff argued that all references to 'court' in the Arbitration Act, referred to the High Court. The plaintiff also pointed out that O. 69 of the RHC governs Arbitration Proceedings and that there are no such provisions in the Subordinate Courts Rules 1980. Counsel for the plaintiff argued that the defendant ought to have applied by way of an originating motion to the High Court for a stay of proceedings under s. 6 of the Arbitration Act 1952 and that the defendant ought not to have applied in the sessions court itself.

I do not accept this argument. Section 6 of the Arbitration Act 1952 is specific. The words "any party to the legal proceedings may .... apply to the court" must logically mean, the court in which the proceedings had been commenced. That is why whilst all other sections in the Arbitration Act make reference to the High Court, it is only s. 6 that does not refer to the High Court. It merely says "apply to the court". If the said section is to bear the meaning given by the plaintiff, then there is no reason why the legislators when formulating this section had not said "apply to the High Court". Since the words "High Court" have been specifically left out, then it is not for this court to read otherwise into the Act.

In the circumstances it is my judgment that the application for stay has been properly taken in the sessions court.

(3) There is no dispute

The plaintiff argued that there is no dispute at all to refer the matter to arbitration since it is the plaintiff's case that the plaintiff can only claim if the death occurred as a result of an accident and the plaintiff points out that that is also the defence's case.

The clause relating to arbitration as found in the policy reads as follows:

> 10. Arbitration
>
> All differences arising out of this Policy shall be referred to the decision of an Arbitrator to be appointed in writing by the parties in difference or if they cannot agree upon a single Arbitrator to the decision of two Arbitrators one to be appointed in writing by each of the parties, within one (1) calendar month after having been required in writing so to do by either of the parties or in case the Arbitrators do not agree of an Umpire appointed in writing by the Arbitrators before entering upon the reference.
>
> The Umpire shall sit with the Arbitrators and preside at their meetings and the making of an award shall be a condition precedent to any right of action against the Company. If the Company shall disclaim liability to the Insured for any claim hereunder and such claim shall not within twelve (12) calendar months from the date of such disclaimer have been referred to arbitration under the provisions herein then the claim shall for all purposes be deemed to have abandoned and shall not thereafter be recoverable hereunder.

To my mind, the relevant portion to consider are the words "all differences arising out of this policy". It is clear that there has arisen a difference of opinion out of this policy. The plaintiff says that the death is accidental and thus is covered by the policy. The defendant says that the death was caused by suicide. There can be no clearer instance of a difference between the parties. In *Accounting Publications Sdn Bhd v. Ho Soo Furniture Sdn Bhd* [1999] 1 CLJ 756, the Court of Appeal had said that what is essential is that the court should, on the material before it, be in a position to express its satisfaction that the defendant is ready and willing to do all things necessary to the proper conduct of the arbitration. The Court of Appeal emphatically has stated that at such an early stage, there is little a defendant is obliged to do in the arbitration beyond asserting a willingness to appoint an arbitrator. The available evidence in the case before me clearly supports the inference that the defendant is ready and willing to do all things necessary to refer the matter to arbitration.

Whilst I agree that this case is one that is eminently suited for trial before a court, yet it is imperative that the court must agree with the views expressed by the parties in the policy that they would rather arbitrate than litigate.

In the circumstances, this appeal is dismissed with costs.